Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

AMERADA HESS CORPORATION, ET AL.,

Petitioners,

v

OWENS-CORNING FIBERGLASS CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Alabama Supreme Court's decision applying a settlement bar to Petitioners' maritime claims for contribution against a settling joint tortfeasor is contrary to controlling precedent from this Court which recognizes the "well-established maritime rule allowing contribution between joint tortfeasors"? Cooper Stevedoring Co. v. Kopke, 417 U.S. 106 (1974).

2. Whether the Alabama Supreme Court's rejection of Petitioners' maritime claims for indemnity against a third party defendant - asbestos manufacturer is contrary to controlling precedent from this Court and to precedent from the Fourth Circuit Court of Appeals?

3. Whether the reverse Erie application of the Supremacy Clause of the United States Constitution requires the Alabama Supreme Court to recognize as controlling

authority the Eleventh Circuit decision which rejects the application of a settlement bar to claims for indemnity or contribution against settling joint tortfeasors in admiralty actions?

LIST OF THE PARTIES

Amerada Hess Corporation

American Trading Transportation Company, Inc.

ARCO Marine, Inc.

Bermuth Lembcke Company, Inc.

Charles Kurz & Co.

Chevron U.S.A., Inc.

Chiquita Brands International, Inc.

Dole Fresh Fruit Co.

Isbrandtsen Company, Inc.

Keystone Shipping Company

Lykes Bros. Steamship Corp.

Marine Navigation Co.

Marine Transport Lines

Marine Transport Management Company, Inc.

National Bulk Carriers

Owens-Corning Fiberglass Corporation

PACO Tankers, Inc.

Red Hills Corporation

United Brands Company

Unocal

Warren Petroleum Company

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II. THE ALABAMA SUPREME COURT'S REJECTION OF PETITIONERS' INDEMNITY CLAIMS IS IN CONFLICT WITH THIS COURT'S DECISION IN RYAN STEVEDORING CO. V. PAN ATLANTIC STEAMSHIP CORP. AND THE FOURTH CIRCUIT COURT OF APPEAL'S DECISION IN VAUGHN V. FARRELL LINES, INC.

III. THE REVERSE ERIE APPLICATION OF THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION REQUIRES THE ALABAMA SUPREME COURT TO RECOGNIZE AS CONTROLLING AUTHORITY THE ELEVENTH CIRCUIT COURT OF APPEAL'S DECISION REJECTING A SETTLEMENT BAR RULE

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The decision from which Petitioners seek relief is officially reported at Amerada Hess Corporation, et al. v. Owens-Corning Fiberglass Corporation, ____ So.2d ____ (Ala. 1993) (case Nos. 1911251 and 1911252). That opinion is set out at Exhibit A of the Appendix. The Orders of the Mobile County Circuit Court granting summary judgment in favor of Respondent and against Petitioners are set out at Exhibit B of the Appendix.

STATEMENT OF THE GROUNDS FOR JURISDICTION

The judgment of the Alabama Supreme Court was rendered on August 27, 1993. An order denying a rehearing was entered on the same date. On November 16, 1993, an order was entered extending until December 23, 1993 the time within which to file this Petition.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257, 28 U.S.C. § 1333 and Supreme Court Rule 10.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, art. VI, cl. 2 as set out in the Appendix, Exhibit D.

STATUTORY PROVISIONS INVOLVED

Sections 1257 and 1333 of title 28 of the United States Code as set out in the Appendix, Exhibit E.

STATEMENT OF THE CASE

This is an admiralty action. The Petitioners Amerada Hess Corporation, American Trading Transportation Company, Inc., Arco Marine, Inc., Bermuth Lembcke Co., Inc., Chevron U.S.A., Inc., Chiquita Brands International, Inc., formerly United Brands Co. and United Fruit Co., Isbrandtsen Co., Inc., Keystone Shipping Co., Chas. Curz & Co., Inc., Lykes Bros. Steamship Co., Inc., Marine Navigation Co., Marine Transport Lines, Marine Transport Management Co., Inc., National Bulk Carriers, Paco Tankers, Inc., Red Hills Corp., United Brands Co., Unocal and Warren Petroleum Co., are steamship companies whose maritime claims for indemnity or contribution against a settling joint tortfeasor were barred by the Alabama Supreme Court. The Petitioners urge that review is warranted because the Alabama Supreme Court's decision is in conflict with controlling

precedent from this Court and precedent from the Eleventh and Fourth Circuit Courts of Appeal. Petitioners also argue that review is appropriate since the Alabama Supreme Court's decision is contrary to the policy of promoting the uniform application of law, and the corollary policy of discouraging forum shopping, as expressed in Erie Railroad v. Tompkins and its progeny.

At trial, the Petitioners were sued under the Jones Act (46 U.S.C. § 688) and under the general maritime law. The plaintiffs allege that they contracted asbestosis while serving in the employ of the Petitioners. The Petitioners, in turn, made third party maritime claims seeking indemnity or contribution from asbestos manufacturer, Owens-Corning Fiberglass Corporation ("OCF"). OCF is the Respondent here.

The Petitioners based their contribution claims on Cooper Stevedoring Co. v. Kopke, 417

U.S. 106 (1974), United States v. Reliable Transfer Co., 421 U.S. 397 (1975) and other decisions which hold that contribution is the rule in the federal maritime law. Petitioners' indemnity claims were supported by this Court's opinion in Ryan Stevedoring Co. v. Pan Atlantic Steamship Corp., 350 U.S. 124 (1956).

The issues of whether contribution and indemnity are available against settling tortfeasors were raised by Respondent during the pleadings stage by way of affirmative defense, motion to dismiss and motion for summary judgment. In its Motion for Summary Judgment, filed on November 2, 1990, Respondent stated:

> The claims of the Third-Party Plaintiffs and Cross-Claimants against the above-referenced Movant are for indemnity and/or contribution, and are due to be dismissed since this Movant has settled the claim of the Plaintiff.

The trial court granted Respondent's summary judgment motions (Appendix, Exhibit B), agreeing

that pro tanto settlements between the plaintiffs and Respondent, to which the Petitioners were not a party, barred Petitioners' third party claims against Respondent. The plaintiffs who settled with Respondent, (James L. Burnett (Case No. 1911251) and Bessie Shepherd (Case No. 1911252)), while not involved in this Petition, have claims against Petitioners which remain pending in the trial court.

Documentation of the settlements between plaintiffs and Respondent, filed in support of Respondent's summary judgment motions, was in the form of releases which evidenced Respondent's pro tanto settlement for $10,000.00 with plaintiff Burnett, and for $25,000.00 with plaintiff Shepherd. The settlements were negotiated in prior pending suits in Texas to which Petitioners were not a party. Consequently, the Petitioners neither consented

nor were otherwise a party to these settlements or releases.

Timely notices of appeal to the Alabama Supreme Court were filed on May 8, 1992. Since the issues in each appeal were identical, Petitioners filed motions to consolidate the appeals, by agreement, on July 9, 1992.

The summary judgments granted by the trial court were affirmed by the Alabama Supreme Court. With respect to indemnity, the court stated that "there is no right to indemnity based on the distinction between active and passive fault in maritime actions filed in Alabama state courts." (Appendix, Exhibit A, Decision of Alabama Supreme Court, pp. 10-11). On the issue of contribution from settling joint tortfeasors in maritime actions, the Alabama Supreme Court refused to follow the rule of the Eleventh Circuit which allows contribution. In affirming the ruling of the trial court, the

Alabama Supreme Court stated that the Eleventh Circuit's refusal "to recognize a settlement bar to contribution" is "inconsistent with the principles of maritime law." (Appendix, Exhibit A, Decision of the Alabama Supreme Court, pp. 17-18).

Finally, although agreeing with Petitioners' position that its decision would potentially lead to forum shopping, the Alabama Supreme Court refused to adopt the Eleventh Circuit opinion allowing contribution against settling joint tortfeasors, thereby conditioning the exercise of that federal right on whether or not suit is filed in federal court.

On appeal, the Petitioners raised the issues of the availability of indemnity and contribution claims in maritime actions. Petitioners assigned as error in their initial appellate brief the trial court's ruling that indemnity and contributions claims were not

available and the court's entry of summary judgments in favor of Respondent on that basis. In their Application for Rehearing, the Petitioners argued that the Alabama Supreme Court's decision frustrated the policy expressed in Erie Railroad v. Tompkins. Petitioners noted that the Alabama Supreme Court's failure to follow the Eleventh Circuit rule which rejects a settlement bar to claims for contribution results in the inconsistent application of federal law within one federal circuit.

ARGUMENT AND CITATION OF AUTHORITIES

I.

THE ALABAMA SUPREME COURT'S DECISION APPLYING A SETTLEMENT BAR TO PETITIONERS' MARITIME CLAIMS FOR CONTRIBUTION IS CONTRARY TO FEDERAL ADMIRALTY LAW AS EXPRESSED IN GOVERNING PRECEDENT FROM THIS COURT AND FROM THE ELEVENTH CIRCUIT COURT OF APPEALS

The "well established maritime rule allow[s] contribution between joint tortfeasors." Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106 (1976). The Alabama Supreme Court, however, rejected Petitioners' maritime claims for contribution and, in so doing, "decided a federal question in a way that conflicts with applicable decisions of this Court." See, Supreme Court Rule 10.

Presented for review in this case are the questions of whether a pro tanto settlement between an admiralty plaintiff and joint

tortfeasor bars indemnity or contribution claims of non-settling tortfeasors against the settling tortfeasor, and, if such claims are barred, whether the settling tortfeasor should remain in the litigation in order that non-settling tortfeasors be allowed to demonstrate for the jury at trial the percentage of fault attributable to the settling tortfeasor to have liability, if any, reduced in proportion to that percentage of fault.

As the Alabama Supreme Court noted in this case, this issue is of "grave consequence" to the voluminous asbestos related cases pending in Mobile, Alabama. (Appendix, Exhibit A, Decision of the Alabama Supreme Court, p. 10). The ultimate resolution of this case will also affect perhaps thousands of other similar maritime actions pending in the courts of New Orleans, New York, Cleveland and Philadelphia.

The question of the application of the "Settlement Bar Rule" to maritime claims for contribution warrants the attention of this Court since its resolution compels the balancing of the established federal maritime right to contribution and the policy of encouraging settlement. There is a split of decision between the federal circuit courts, and now between the state courts of Alabama and the very federal circuit in which they sit, or whether a settlement bar should be applied in these cases. Thus, the questions presented in this case are ripe for review by this Court.

Petitioners submitted briefs to the Alabama Supreme Court arguing that a settlement bar rule should not be applied to their maritime claims for contribution against settling defendants. This position is the first of three approaches set forth in Section 886A of the Restatement (Second) of Torts:

> The money paid extinguishes any claim that the [plaintiff] has against the party released and the amount of his remaining claim against the other tortfeasor is reached by crediting the amount received; **but the transaction does not effect a claim for contribution by another tortfeasor who has paid more than his equitable share of the obligation.**

Emphasis added.

The Eleventh and Fourth Circuit Courts of Appeal follow this approach, allowing actions for contribution in favor of non-settling tortfeasors who are held liable for more than their pro rata share of fault. See, Great Lakes Dredge & Dock Co. v. Tanker ROBERT WATT MILLER, 957 F.2d 1575, 1582 (11th Cir.) cert. denied, ____ U.S. ____, 113 S. Ct. 454 (1992) ("[A]n action for contribution against a settling tortfeasor may be maintained by a non-settling tortfeasor that has paid more than its share of the plaintiffs' damages based upon

the respective degrees of fault."); Vaughn v. Farrell Lines, Inc., 937 F.2d 953 (4th Cir. 1991) (expressly allowing a non-settling tortfeasor's cross-claims against a number of settling asbestos manufacturers who were found to be joint tortfeasors).

The remaining two options set forth in the Restatement do not provide for actions for contributions against settling joint tortfeasors. (Appendix, Exhibit C, Options II and III). The Eighth Circuit Court of Appeals, in Associated Electric Cooperative, Inc. v. Mid-America Transportation Co., 931 F.2d 1266 (8th Cir. 1991), adopted Option III, which provides that a judgment against a non-settling defendant is reduced by an amount equivalent to the settling defendant's pro rata share of fault, but prohibits claims for contribution or indemnity. Option III is also the option

adopted by the Alabama Supreme Court in this case.

If Contribution Claims Against Settling Tortfeasors are Extinguished, Settling Tortfeasors Should Remain in the Litigation to Ensure Accurate Apportionment of Fault.

Argument was also made by Petitioners that if the Alabama Supreme Court did bar their maritime contribution claims against the settling joint tortfeasor, i.e., Respondent, then the Respondent should not be dismissed from the litigation between the Petitioners and plaintiffs. Under United States v. Reliable Transfer Co., 421 U.S. 397 (1975), Petitioners should not be held liable for an amount greater than their pro rata share of a judgment. If Respondent is dismissed entirely from the action, thereby compromising Petitioners' ability to demonstrate for the jury the percentage of fault attributable to Respondent to have their liability, if any, reduced

proportionately, and assuming that Petitioners are barred from making independent contributions claims, there would be no mechanism remaining to ensure the result that is mandated by this Court's decision in Reliable Transfer Co., 421 U.S. at 411 (liability for damages in maritime actions "is to be allocated among the parties proportionately to the comparative degree of their fault . . . ."

Here, Petitioners note that this Court has accepted certiorari in two cases for the October 1993 term which present issues exceeding similar to those in the case sub judice. First, in McDermott, Inc. v. Clyde Iron, 979 F.2d 1068 (5th Cir. 1992) cert. granted, ___ U.S. ___ (1993), this Court will consider the question of the appropriate set-off to be made on a judgment against a non-settling tortfeasor on account of a settlement between the plaintiff and settling tortfeasor. Next, in Boca Grande Club, Inc. v.

Polackwich, 990 F.2d 606 (11th Cir.) cert. granted, ____ U.S. ____ (1993), this Court will entertain an appeal involving a summary judgment in favor of a settling tortfeasor which was vacated by the Eleventh Circuit Court of Appeals on the basis of the court's decision in Great Lakes Dredge & Dock Co. v. Tanker ROBERT WATT MILLER, 957 F.2d 1575 (11th Cir.) cert. denied, ___ U.S. ____, 113 S. Ct. 484 (1992), which provides for contribution against settling tortfeasors.

Given this Court' determination to hear the appeals in McDermott and in Boca Grande Club, Inc., Petitioners submit that review in this case is warranted and would afford the Court a full and complete hearing, including on the question of whether the settling tortfeasor should remain in the litigation for purposes of determining proportionate fault if contribution is not to be preserved against the settling

tortfeasor. This issue will not be before the Court in either McDermott or Boca Grande Club, Inc.

There is a conflict among the circuit courts, and even between the Supreme Court of Alabama and the Eleventh Circuit, as to the approach which should govern the effects of pro tanto settlements. The Restatement itself refused to endorse any one option. ("The Institute leaves these issues to a caveat and takes no position.") Given the existence of this conflict, the wide ranging and profound effect on perhaps thousands of pending admiralty suits and the clear federal nature of the question, it is crucial that this Court review and resolve these most pressing issues.

II.

THE ALABAMA SUPREME COURT'S REJECTION OF PETITIONERS' INDEMNITY CLAIM IS IN CONFLICT WITH THIS COURT'S DECISION IN RYAN STEVEDORING CO. V. PAN ATLANTIC STEAMSHIP CORP. AND THE FOURTH CIRCUIT COURT OF APPEAL'S DECISION IN VAUGHN V. FARRELL LINES, INC.

Petitioners submit that the Alabama Supreme Court's rejection of their indemnity claims is contrary to the federal law of admiralty as established by this Court and by the Fourth Circuit. This Court has ruled that shipowners are entitled to full indemnity based on a third party defendant's warranty of workmanlike service. Ryan Stevedoring Co. v. Pan Atlantic Steamship Corp. 350 U.S. 124 (1956). Indemnity in Ryan Stevedoring Co. is based on a contractual relationship between the parties, and may be premised on a defendant's supply of a defective product. A claim for indemnity under Ryan is distinct from a claim

for contribution. Ryan Stevedoring Co., 350 U.S. at 133.

Consequently, indemnity based on Ryan is particularly appropriate here, where Petitioners' indemnity claims against Respondent are based on Respondent's supplying asbestos products which caused the alleged injury. The Alabama Supreme Court's rejection of Petitioners' indemnity claims is therefore in conflict with governing precedent from this Court.

Additionally, review in this case is desirable since the decision of the Alabama Supreme Court is in direct conflict with the persuasive Fourth Circuit decision, Vaughn v. Farrell Lines, Inc. 937 F.2d 957 (4th Cir. 1991). The facts in Vaughn are exceedingly similar to those in this case. In Vaughn, the plaintiff sought damages against shipowners for the death of her husband caused by an

asbestos-related disease. Shipowners were allowed to recover on their claim for indemnity against the manufacturer of ship's boilers which contained asbestos insulation. The Fourth Circuit Court of Appeals found that the asbestos manufacturer was the active wrongdoer and should be made to bear the ultimate burden of loss. The court in Vaughn stated:

> This active-passive theory typically arises when the indemnitee has been held absolutely liable for the wrongful act of another as in an "admiralty context where a shipowner held liable on an unseaworthiness claim is awarded indemnity against a third party whose negligence caused the unsafe condition resulting in injury to a seaman." White, 662 F.2d at 249; see also Simpson Timber Co. v. Parks, 390 F.2d 343 (9th Cir.), cert. denied, 393 U.S. 858, 89 S. Ct. 130, 21 L. Ed. 2d 127 (1968). It was in almost this same context that the shipowners' right to indemnity arose in this case. In the indemnity trial, the

> district court found that the presence of asbestos insulation in the boilers manufactured by Foster Wheeler on shipowners' vessels rendered them unseaworthy; that such unseaworthiness caused the shipowners' [sic] to become liable to seaman Vaughn; and that the shipowners were not themselves guilty of negligence which either exacerbated the injuries or the likelihood thereof.

Vaughn, 937 F.2d at 357.

Therefore, where, as here, liability for a defective product is at issue, and the shipowner's liability to a seaman arises out of the mere presence of the defective product aboard the ship, the nature of liability is vicarious and thus indemnity is an appropriate remedy. The Vaughn decision recognizes that shipowners remain entitled to indemnity under admiralty law where they are only vicariously liable.

The conflict created by the Alabama Supreme Court's refusal to follow Ryan and/or

Vaughn provides a "special and important" reason for granting Petitioners' Writ of Certiorari in this case as set forth in Rule 10 of the Supreme Court Rules.

III.

THE REVERSE ERIE APPLICATION OF THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION REQUIRES THE ALABAMA SUPREME COURT TO RECOGNIZE AS CONTROLLING AUTHORITY THE ELEVENTH CIRCUIT COURT OF APPEAL'S DECISION REJECTING THE SETTLEMENT BAR RULE

The decision of the Alabama Supreme Court to reject the rule in the Eleventh Circuit which allows contribution against settling maritime joint tortfeasors establishes "a double system of conflicting laws in the same State." See, Guaranty Trust Co. v. York, 326 U.S. 99 (1944). Such a "double system", according to this Court, "is plainly hostile to the reign of law." Guaranty Trust Co., 326 U.S. at 112. The

"double system of conflicting laws" which the Court denounced in Guaranty Trust Co. operated when federal courts exercising diversity jurisdiction over state causes of action did not recognize as controlling the substantive law of the state in which it sat, but rather developed and applied a federal common law. That practice, of course, was invalidated in Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). Nevertheless, the Alabama Supreme Court's refusal in this admiralty, i.e., federal action to recognize as controlling the federal law of the circuit in which it sits, together with its adoption of a conflicting rule has installed in Alabama the mirror image of the "hostile" system which this Court banned in Erie.

Clearly, the Alabama Supreme Court's decision in this case frustrates the "nub" of the policy underlying Erie, which is "that for the same transaction the accident of a suit ...

in federal court instead of in a State court a block away should not lead to a substantially different result." Guaranty Trust Co., 326 U.S. at 109. This, however, is precisely the unfortunate circumstance in which **both settling and non-settling** tortfeasors find themselves in Alabama. If the decision of the Alabama Supreme Court in this case is left undisturbed, the respective liabilities of settling and non-settling maritime tortfeasors in Alabama will be determined by the plaintiff's forum choice, rather than by the federal rule set forth by the sitting federal circuit court. If the plaintiff files the primary suit in a federal court in Alabama, the non-settling tortfeasor's right to contribution is preserved against a third party settling tortfeasor under Great Lakes Dredge & Dock Co. v. Tanker ROBERT WATT MILLER, 957 F.2d 1575 (11th (Cir.) cert. denied, ____ U.S. ____, 113 S. Ct. 484 (1992).

If, by chance, the primary suit is instead filed in state court in Alabama, the settling tortfeasor escapes since the Alabama Supreme Court has now extinguished the non-settling tortfeasor's right to contribution.

Thus, the "substantially different" result engendered by the Alabama Supreme Court's decision, which frustrates the dictates of Erie, affects the well established federal maritime right to contribution. While that right is preserved and enforced in the federal district courts in Alabama, it will now be ignored in significant respects by Alabama state courts which are bound by the decision of the Alabama Supreme Court.

Another ground on which this Court should accept certiorari in this case is that the Supremacy Clause of the United States Constitution (Appendix, Exhibit D) compels that federal law should be applied uniformly within a

federal circuit, whether the forum is a state court or federal district court. In Felder v. Casey, 487 U.S. 131 (1988), this Court made clear that a system of conflicting federal law in one state runs afoul of the Erie Doctrine and the Supremacy Clause.

> Just as federal courts are constitutionally obligated to apply state law to state claims, see, Erie, supra, at 78-79, 82 L. Ed. 1188, 58 S. Ct. 817, 11 Ohio Ops 246, 114 ALR 1487, so too the Supremacy Clause imposes on state courts a constitutional duty "to proceed in such manner that all the substantial rights of the parties under controlling federal law [are] protected."

Felder, 487 U.S. at 151. The "substantial" federal right at stake here is the maritime right to contribution. (See, Kopke, 417 U.S. 106).

The Alabama Supreme Court's rejection of the Eleventh Circuit rule which preserves the

right to contribution is manifestly inconsistent with the goal of uniform application of federal law.

CONCLUSION

For the reasons set forth above, such reasons conforming to those in Supreme Court Rule 10, the Court should review this case on Writ of Certiorari.

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